respects. For example, Congress does not prohibit the sharing of computer facilities as the Commission did in Computer II. Congress also created an explicit joint marketing exception.[34] Nevertheless, the fact that under the Computer II rules, the Commission permitted holding companies and service entities to provide governance and administrative support functions to the BOC and a fully separate subsidiary is persuasive evidence that Congress expected and intended the same result in enacting Section 272.

These services are generally described as corporate governance functions and enterprise level administrative and support services. Permitting the performance of each of these functions on a common, centralized basis separate from both the BOC and its separate affiliate will promote economic efficiency, without compromising the operational separateness of the BOC and its Section 272 affiliate(s). A review of the categories of governance and administrative support functions which are candidates for inclusion in the holding company confirms this conclusion.

1. Corporate Governance - Certain functions are inherent in the responsibility of the holding company for governance of the enterprise as a whole. While the holding company may assign them to a services subsidiary, it would make little sense to assign them to either the BOC or its separate affiliate. Examples of these functions include (but are not limited to) the activities of corporate officers such as the Chairman and Chief Executive Officer, the General Counsel, and the Chief Financial Officer, all of whom

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[34] Section 272(g)(2).

have responsibilities to public shareholders which span the entire enterprise. These officers require support from specialized organizations in order to fulfill their governance responsibilities.

These functions are integrally related to the task of governing the overall enterprise and maintaining and enhancing shareholder value. Nothing in the Act suggests that these functions cannot be provided, subject to the Commission's cost allocation rules, by a holding company or service entity to both a BOC and its separate affiliate.[35]

2. Enterprise Level Administrative and Support Services - Section 272 requires that, among other things, the separate affiliate "operate independently from" and "have separate officers, directors and employees from" its affiliated BOC.[36] These requirements are directed to the BOC and its separate affiliate, and cannot be read to require the BOC and its affiliate to completely duplicate administrative and support functions of the kind regularly performed on a centralized basis by a holding company or other service subsidiary of the holding company. Enterprise level functions such as human resources, public relations, corporate strategic planning, external affairs, regulatory and information systems planning and management are frequently provided by centralized organizations.[37]

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35 The Commission's approach to shared services in Computer II demonstrates that holding company or service company provision of such services was accepted, notwithstanding the "maximum separation" requirements. See, e.g. NYNEX Corp. Plan for Sharing Administrative Services, ENF85-24, Order released June 17, 1986 (Chief, Common Carrier Bureau).

36 Section 272(b)(1)(3).

37 See, Connell, "Learning to Share", Journal of Business Strategy, March/April 1996, p. 55. The Commission's Computer II experience also provides ample evidence of the prevalence,

The NPRM tentatively concludes that "Section 272(b)(3) prohibits the sharing of in-house functions such as operating, installation, and maintenance personnel, including the sharing of administrative services that are permitted under Computer II if those services are performed in-house."[38] As we have already shown, Section 272 presupposes the existence of a holding company, and establishes separation requirements which apply to the relationship between the BOC and its separate affiliate, rather than to that between either of those companies and their ultimate corporate parent. It is also critical to recognize that a prohibition on sharing of operating personnel raises substantively different issues than the centralization of administrative and support services outside the BOC. First, Section 272(b)(1) clearly requires the separate affiliate to operate independently of the BOC. It does not, however, require it to conduct its business without the governance of and administrative support from its ultimate parent. Second, sharing of operating personnel and administrative services present significantly different potential risks of harm to ratepayers and competition. For example, one set of potential

at least in the telecommunications industry, of the centralization of many of these functions. See, e.g. NYNEX Corp. Plan for Sharing Administrative Services, supra. This Order approved a plan which permitted NYNEX Corporate and NYNEX Service Company to provide an array of services on a centralized basis to both the NYNEX Telephone Companies and to NYNEX Business Information Systems Company. These services include: comptroller and treasury functions, corporate secretarial, corporate planning, corporate marketing, legal, personnel, public relations, federal regulatory and government relations. It is important to note that the Computer II rules required, as does Section 272, separate officers and directors. 47 C.F.R. 64.702. The Commission has had no experience which suggests that the shared services permitted by Computer II have adversely impacted the independence of those subsidiaries.

[38] NPRM, ¶ 62.

harms enumerated in the NPRM[39] could arise from the sharing of operating personnel. These potential harms are not present in the utilization of certain centralized administrative functions whose role is to support business unit operating personnel. Finally, the centralized administrative services NYNEX believes should be provided by the holding company or service company are clearly back-office type functions rather than operating functions.

A cursory review of business literature on governance and shared services demonstrates that there is no single right way to organize to provide support services in American business. Many businesses have opted for centralization of a variety of functions, including, for example, human resources,[40] information technology,[41] financial support functions,[42] and strategic planning.[43] There is no compelling reason for the Commission to seek to enforce a decentralized approach to common administrative services, thus depriving NYNEX and the other RHC's of the ability to efficiently and effectively structure their businesses, in ways consistent with the provisions of Section 272.

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39 NPRM ¶ 65 posits that a BOC could be incented to provide inferior service, charge higher prices to, or fail to share information with its rivals.

40 See, e.g., Greengard, "HRIS: the next generation", Personnel Journal, Vol. 73, No. 3, March 1994.

41 See, e.g., Hammer and Champy, Reengineering the Corporation, Harper Collins, 1993, pp. 63-64.

42 See, e.g., Smart, "A Day of Reckoning for Bean Counters", Business Week, March 14, 1996, p. 75.

43 See, e.g., Wise, "An Evolving Partnership", Research - Technology Management, Volume 38, No. 6, pp. 37-39 (1995).

3. Specific Services and Functions - For the reasons discussed above, the Section 272 safeguards do not preclude (nor require) the provision of governance and administrative support functions to both a BOC and its separate affiliate by the parent or holding company, or by a service entity owned by the holding company. The description of these functions below demonstrates that they do, in fact, involve a combination of governance and administrative support, and are not operating functions.[44]

a. Chairman and Chief Executive Officer - Ultimately responsible to the Board of Directors and to the shareholders for the overall performance of the enterprise.

b. Chief Financial Officer - Responsible, on a enterprise-wide basis, for financial assurance and planning, accounting practices, auditing, taxes, financial and treasury operations, external financial reporting, investment analysis and planning, risk management, affiliated transaction compliance, pension fund management, and investor relations. These functions are plainly holding company type functions, integral to the Chief Financial Officer's responsibility to the Board and the corporation's shareholders.

c. General Counsel - This group of functions includes enterprise-wide responsibility for substantive legal advice to the management of the business with respect to corporate and securities matters, labor and employment, antitrust, regulatory, litigation, business development, taxes and commercial law, as well as for legal compliance programs and the corporate secretarial functions.

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[44] These descriptions are intended to provide a high level summary of the functions that these organizations perform, and are not intended to be comprehensive.

d. Strategic Planning - The task of enterprise-level strategic planning, including resource allocation, technology selection, overall marketing policies and strategies, and brand name identity/promotion[45] are clearly governance functions appropriate for a holding company or service entity to perform, rather than a BOC or a separate affiliate.

e. External Affairs - The enterprise's success requires integrated public relations, regulatory and government affairs strategies. This function includes activities undertaken on behalf of the holding company and its stockholders, as well as services provided to operating business units.

f. Chief Information Officer - The development of common platforms, interoperability standards, and software development paradigms and the operation of data centers, intranets and data networks are plainly governance and administrative services which the enterprise should be free to choose to perform centrally for the enterprise as a whole. These services are commonly outsourced and readily susceptible to detailed cost assignment. The development of applications software to support specific business unit activities is the final element of the information systems function. This work is distinct from the building of common system platforms and networks and is highly business unit focused. It therefore presents a less compelling case for centralized provision.

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[45] NYNEX's success in the emerging competitive markets will depend, in part, on its ability to offer "a widely recognized brand name that is associated with telecommunications services." NPRM ¶ 6.

g. Human Resources - People related functions which have an enterprise-wide focus include benefits planning and administration, management compensation, personnel administration, the Office of Ethics and Business Conduct, labor relations strategy and planning, succession planning and personnel development.

h. Specialized expertise - Other functions, requiring specialized expertise to assure maximum cost effectiveness, also exhibit the characteristics of governance and administrative support services. The following examples illustrate this category of services:

> Real estate operations (as distinct from common occupancy of a particular location) requires real estate professionals familiar with identifying and negotiating the acquisition of suitable commercial real estate locations and the provision of routine maintenance services;
>
> Logistics management is necessary to assure fast, accurate distribution to all locations of internal company mail or materials; and
>
> Technology analysis and evaluation, such as that performed today by NYNEX Science and Technology experts on behalf of all NYNEX entities on a project by project cost-reimbursable basis.

4. Summary - The above descriptions of governance and administrative support functions demonstrate that these functions are truly enterprise-wide in their scope. These are functions which are commonly centralized at a holding company or service entity, for both economic and governance reasons. Congress did not intend, in enacting Section 272, to require that they be provided in an inefficient or ineffective manner.

C. Bell Operating Companies May Transfer Personnel To Implement The Provisions of The Communications Act

Compliance with the structural requirements of the Act, and specifically with Section 272, is likely to require NYNEX to restructure many existing business functions, particularly support functions currently provided by Telesector Resources Group (a subsidiary of the NYNEX Telephone Companies). The current alignment of services and functions is a product of past management decisions designed to achieve maximum efficiency and cost effectiveness in the context of relevant market, technology, and regulatory[46] factors. All of those factors have now been altered by the Act.

Section 272(b)(1) mandates that the separate affiliate "shall operate independently from the Bell operating company." Section 272(b)(3) mandates that the separate affiliate "shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate." Implementation of these provisions of the Act may require the transfer of BOC personnel to either the holding company, or to a service subsidiary of the holding company which provides administrative and support services to a wide range of subsidiaries. Voluntary movement of limited numbers of BOC personnel to separate affiliates is also a likely consequence of the upheaval in the industry generated by the Act.

The Commission expressed concern that "a BOC might have the incentive and ability to transfer network capabilities of its local exchange company to the operations of its competitive affiliates to avoid the nondiscriminatory provision of these capabilities as

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[46] See, e.g., The Plan For Comprehensive Restructuring of NYNEX Corporation and Its Affiliates, New York Public Service Commission Case 91-C-0102, July 22, 1991.

required by sections 272(c)(1) and (e)." NPRM ¶ 70. The functional transfers described above are not transfers of "network capabilities" (NPRM ¶ 70) or "local exchange operations" (NPRM ¶¶ 33 and 79). The personnel who would be transferred from the BOC would be employees who provide traditional holding company governance services or who perform administrative support services and functions. This would not involve the wholesale transfer of network operations work groups, which might arguably be essential to the provision of "network capabilities of [the] local exchange company," or its "local exchange operations.[47] Nor would such personnel transfers constitute a transfer of operating assets, facilities or functions that could convert the receiving company into a successor or assignee of the BOC under Section 3(4)(B) of the Act because the receiving company is not providing wireline telephone exchange service. The "network capabilities" and "local exchange operations" of the BOC would, therefore, remain intact to permit the BOC to satisfy its obligations under other sections of the Act and the Commission's newly adopted rules.

47 It is likely that a limited number of employees who are knowledgeable about "network capabilities of [the] local exchange company" will voluntarily take jobs in separate affiliates, thus providing them with a basic level of expertise to enable the separate affiliate to commence doing business. The Commission has never sought to limit or preclude the voluntary movement of personnel from regulated companies to affiliates.

D. Nondiscrimination Safeguards Of Section 272(c) Do Not Apply To The Provision Of Holding Company Functions Or Administrative And Support Services

The NPRM also addresses the nondiscrimination requirements of Section 272(c). That section states that in its dealings with the separate affiliate, the Bell operating company "may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards...." Section 272(c)(1). The context of both the statute and the NPRM clearly indicate the nondiscrimination requirement is applicable to network capabilities for the provision of telephone exchange service, exchange access and interLATA or intraLATA facilities.[48] Section 272(c) does not require that holding company functions and administrative and support services provided to a Section 272 separate affiliate be provided on a nondiscriminatory basis to third parties. Holding company functions and administrative and support services affect only internal functions and are services which are not appropriately provided to third parties. Moreover, it is highly unlikely that an interexchange carrier would request that a BOC make tariff filings on its behalf, conduct job evaluations of its employees or assume responsibility for the interexchange carrier's relations with the financial community. Section IV of these Comments describes the application of the nondiscrimination requirements of Section 272 to services and facilities provided by the BOC.

[48] See, Section 272(e).

In addition, the structural reorganization and personnel reassignments described above will significantly reduce or eliminate the provision of holding company and administrative and support services by the BOC. When existing holding company functions and administrative and support services are provided out of either the holding company or an administrative services subsidiary of the holding company, the BOC will not be subject to allegations of nondiscriminatory dealings with regard to these functions. The BOC will be, instead, properly focused on the provision of network capabilities in fulfillment of its obligations under other provisions of the Act and the Commission's rules.

IV. SECTION 272 AUTHORIZES BOC PROVISION OF SERVICES TO ITS SEPARATE AFFILIATE ON A NONDISCRIMINATORY BASIS (NPRM ¶¶ 65-89)

Section 272(c) and (e) authorize BOC provision of certain functions and services to its separate affiliate(s). These provisions carve out clearly defined exceptions to the structural separation requirements of Section 272(a) and (b), in addition to the joint marketing authorization of Section 272(g)(2), discussed above. The Commission has requested comments with respect to the implementation of these provisions. The request for comments is certain to engender numerous and extraordinary proposals from competitors which will seek to frustrate the expressly authorized BOC activities. However, the balanced Congressional plan is clear. There is no need for elaborate Commission rulemaking in the statutory area.

In response, three key points require emphasis. First, the statutory provisions developed by Congress are quite specific in establishing the terms under which a BOC and an affiliate subject to the requirements of Section 251(c) shall meet particular service requests of other entities. There is no need for further defining or limiting these provisions. For example, there would be no basis for the Commission to limit the "scope" of the Congressional authorization that a BOC may provide "interLATA or intraLATA facilities to its interLATA affiliate" when Congress itself has established in Section 272(e)(4) the conditions which the BOC must satisfy (NPRM ¶ 89). Instead, the Commission should simply indicate its intent to regulate the conduct of the BOCs, as their plans develop, subject to the terms of the statute.

Second, Section 272 does not operate to limit a BOC's ability to sell services related to its local exchange operations to its separate affiliate, provided that it does so on a non-discriminatory basis and meets certain accounting requirements. Section 272(e) makes this explicit for three specific categories of services: (1) telephone exchange and exchange access services;[49] (2) any facilities, services or information concerning its provision of exchange access;[50] and, (3) interLATA and intraLATA facilities or services.[51] The non-discrimination requirements of Section 272(e) are, at least for the period prior to the sunset of Section 272(c)(1), encompassed by the Section 272(c)(1)

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[49] Section 272(e)(1).

[50] Section 272(e)(2).

[51] Section 272(e)(4).

prohibition on discrimination. Section 272(e) confirms the clear meaning of Section 272(c)(1): notwithstanding the "operate independently" requirements of Section 272(b)(1), a BOC may provide a wide array of services and facilities to its separate affiliate, including interLATA facilities, provided it does so on a nondiscriminatory basis.

Third, the nondiscrimination provisions ensure that a BOC separate affiliate will obtain no competitive advantage from its purchase of BOC services or facilities, since it will receive neither more favorable prices and terms nor more advantageous services from the BOC than its marketplace competitors. Congress required what are essentially arm's length dealings between the BOC and its separate affiliate, although it is also clear that Congress did not, through Section 272(c) or (e) mandate that the BOC provide services to third parties which it is not otherwise obligated to provide, unless it elects to provide them to its separate affiliate.

All that is called for by Congress is that the BOCs will "account for all transactions with the affiliate" provided pursuant to the Section 272(c)(1) authorization "in accordance with accounting principles designated or approved by the Commission" (Section 272(c)(2)). While this may require Commission rulemaking in the <u>Accounting NPRM</u>, it requires no new regulations herein.

V. A BOC WHICH PROVIDES INTERLATA SERVICE "GRANDFATHERED" UNDER SECTION 271(f) DOES NOT REQUIRE A SEPARATE AFFILIATE, NOR DOES A BOC-PROVIDED INFORMATION SERVICE WITHOUT BUNDLED BOC-PROVIDED INTERLATA TRANSPORT (NPRM ¶¶ 31-54)

Section III of the NPRM raises a number of questions concerning when and whether BOC activities are subject to the Section 272 separate affiliate requirements. Major questions concerning this issue are discussed below.[52]

A. Origination Of InterLATA Service Activities "Grandfathered" Under Section 271(f) Are Never Subject To Section 272 Separation Requirements, But "Grandfathered" Manufacturing And InterLATA Information Service Activities May Be Subject To Section 272, Depending On The Terms Of The MFJ Court's Order

Section 272(h) provides that "[w]ith respect to any activity in which a Bell operating company is engaged on the date of enactment of the Telecommunications Act of 1996, such company shall have one year from such date of enactment to comply with the requirements of this Section." Section 271(f) states "[n]either subsection [271](a) [relating to BOC provision of interLATA services] nor Section 273 [relating to BOC manufacturing] shall prohibit a Bell operating company or affiliate from engaging, at any time after the date of enactment of the [1996 Act], in any activity to the extent authorized by, and subject to the terms and conditions contained in" an order of the MFJ Court.

The Commission seeks comment on whether Section 272(h) applies to the activities listed in Section 272(a)(2)(A),(B) and (C) [manufacturing, origination of interLATA telecommunications services, and provision of interLATA information

[52] The tentative conclusion (NPRM ¶ 33) that a BOC may conduct all or any activities requiring a separate affiliate in a single separate affiliate is clearly correct, as demonstrated by, among other things, the legislative history cited in fn. 64 of the NPRM.

services, respectively] which the BOCs were providing pursuant to an Order of the MFJ Court on the date the 1996 Act was passed (NPRM ¶34).

The answer to this question is clear, because the Act itself limits in two separate ways the activities for which a separate affiliate is required. First, sections 272(a)(1) and (2) state that, "IN GENERAL", a separate affiliate is required for manufacturing activities and the provision of interLATA information services (Section 272(a)(2)(A) and (C)), but not for origination of interLATA telecommunications services previously authorized by the MFJ Court (Section 272(a)(2)(B)(iii)). Second, and more specifically, section 271(f) states that BOC manufacturing and interLATA activities which would otherwise be prohibited by the Act are nevertheless permitted ("grandfathered") if approved by an Order of the MFJ Court, "subject to the terms and conditions contained in" such Order.

Since some such "grandfathered" MFJ orders contain a separate affiliate requirement, and some do not, it follows, considering sections 271(f), 272(a), and 272(h), that "grandfathered" origination of interLATA telecommunications services are never subject to section 272 separate affiliate requirements, whereas "grandfathered" manufacturing and interLATA information services activities are or are not subject to section 272 requirements depending on the terms of the MFJ Court's Order(s).

This conclusion makes eminent sense in view of the actual scope of the MFJ waivers granted by the Court. For example, with respect to manufacturing, the December 15, 1986, NYNEX foreign business waiver and the February 4, 1993 international business waiver granted to all the BOCs, taken together, permit NYNEX to manufacture CPE and telecommunications equipment outside the United States.[53] These waivers are subject to the condition that NYNEX conduct its foreign manufacturing business through "one or more corporations that shall be separate from NYNEX's operating telephone companies." It is therefore not surprising that Congress chose to continue the existing separation requirement as to manufacturing, but gave the BOCs one year to conform to the (likely-to-be more detailed) separation requirements of the Act.[54]

Similarly, it is not surprising that Congress chose to impose no separate affiliate requirement on MFJ-authorized BOC provision of originating interLATA telecommunications services, because, to NYNEX's knowledge, all previously granted domestic interLATA waivers contemplated that BOC telephone operating companies would provide the interLATA service. Given the actual purpose and scope of existing interLATA MFJ waivers, a separate affiliate requirement would make absolutely no sense, since, if the waivered service could not be provided by a telephone operating company, it would not be provided at all.

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[53] No MFJ waiver granted to NYNEX permits the manufacture of CPE or telecommunications equipment within the United States or the foreign manufacture and import of more than a de minimis amount of such equipment.

[54] Many MFJ waivers contain the condition that a BOC engage in certain activities only through a "separate" corporation. MFJ practice never defined this requirement in any detail, and hence it is likely that the Section 272 separate affiliate requirements will be different (or at least more detailed) than the MFJ requirement.

For example, the most common type of interLATA waiver (NYNEX has more than a dozen) is a waiver to provide Extended Area Service ("EAS") to a small number of usually rural customers. Such waivers, which were typically aggressively supported by State Public Service Commissions, allow a telephone company to expand its customers' "local" calling area to include nearby "communities of interest" which happen to be in a different LATA. It would make no sense to impose a separate affiliate requirement on such activity, since only a telephone operating company is in a position to provide the service permitted by the waiver.[55]

B. There Is A "Permanent Exemption" From The Separate Affiliate Requirements For "Previously Authorized" Origination Of InterLATA Telecommunications Service Activities

The NPRM seeks comment on whether Section 272(a)(2)(B)(iii) grants a "permanent exemption for previously authorized activities" from the separate affiliate requirements (NPRM ¶ 38), notwithstanding the Section 272(h) language that for "any activity" in which a BOC is engaged on the enactment date, one year is given to "comply with the requirements of this section." But, of course, Section 272(a)(2)(B)(iii) explicitly states that previously authorized BOC origination of interLATA telecommunications services is not subject to Section 272 separate affiliate requirements. The transition provision of Section 272(h) does not itself create separate affiliate requirements, but

[55] Similarly, it would make no sense to impose a separate affiliate requirement on certain interLATA information service waivers, such as the June 21, 1989 waiver which permits New York Telephone to provide directory assistance services to Independent Telephone companies on an NPA-wide basis.

merely authorizes a transition period if a separation requirement is imposed by the Act. Thus, the exemption is clearly "permanent".

C. The Act Requires A Separate Affiliate When A BOC Provides The InterLATA Transport Portion Of "InterLATA Information Services," But Not When A BOC Provides An Information Service And Another Entity Provides InterLATA Transport

The NPRM seeks comment on how the Commission should distinguish between an interLATA information service and an intraLATA information service (NPRM ¶ 44). In addition, the NPRM specifically seeks comment on whether an information service should be considered an interLATA information service "only when the service actually involves an interLATA telecommunications transmission component," or whether an interLATA information service is any information service which "potentially" involves an interLATA telecommunications transmission component (id.).

The Act specifies in Section 272(a)(1) that a "Bell operating company (including any affiliate)...not provide [interLATA information services] unless it provides that service through one or more [separate] affiliates..." (emphasis added). Since the Act defines "interLATA service" as "telecommunications between a point located in a [LATA] and a point located outside such [LATA]" (see section 3(a)(2)(42)), it follows that a BOC may "provide" an "interLATA information service" (or any other kind of "interLATA service") only if the BOC "provides" "telecommunications" (defined to mean "transmission" (see section 3(a)(2)(48)) between a point located in one LATA and a point outside that LATA.[56]

Thus, the Act itself makes it clear that unless the BOC (or affiliate) itself provides interLATA "telecommunications" (defined as "transmission"), no separate affiliate is required. There is absolutely no basis for the suggestion in the NPRM that a service may be considered interLATA merely because it could be or is accessed from a different LATA. By that logic, BOC provision of exchange access service would involve a prohibited interLATA telecommunications service.

Moreover, the separate affiliate requirement applies to information services only if an interLATA service is a bundled component of the information service. In cases where interLATA and information services are separately purchased, the purchases should be treated as independent transactions -- which is exactly what they are. A customer's use of an information service and an independently provided interLATA service does not convert that information service into an interLATA information service. The result should not differ if the interLATA service is provided by a separate affiliate of a Bell operating company rather than a third-party interLATA communications company.

[56] Because the definition of "interLATA information service" necessarily involves BOC provision of interLATA "telecommunications", it follows that the tentative conclusion in NPRM ¶ 41 that a BOC must provide out-of-region interLATA information services through a separate affiliate is incorrect. As Section 271(b)(2) makes clear, any out-of-region interLATA service may be provided by a BOC, without a separate affiliate requirement.

The result should vary, and a separate affiliate is required by section 272(a)(2)(c), if the information service and the interLATA service are sold as a bundled package. For example, if the Bell company offers telemessaging with an associated 800 number for a single price the entire service should be treated as an interLATA information service subject to the separate affiliate requirements. If , however, the Bell company provides an information service for a price, and its separate affiliate sells an interLATA service to the same customer for a separate price, no separate affiliate should be required for the information service.[57]

The term "provide interexchange telecommunications services" has a long history under the MFJ,[58] and although the term was interpreted somewhat broadly by the MFJ Court, it was never interpreted so broadly as to encompass provision of an information service (without transmission) that was accessed on an interLATA basis by means independently chosen by the customer. Thus, for example, in the referenced MFJ "gateway" decision (NPRM ¶ 45, n. 87), the decisive fact that led the Court to conclude that the Bell Atlantic proposal would impermissibly involve provision of interexchange service was that Bell Atlantic provided interLATA transmission between the customer and the computer(s), not that information was stored in a computer and made available to

[57] If the Bell operating company offers the interLATA service of the separate affiliate as the sales agent of the separate affiliate there should be no difference in result. See Section II (B), supra.

[58] The MFJ stated in Section II (D) that "no BOC shall...provide interexchange telecommunications services...."

customers (an information service), nor even that information was stored in multiple computers in multiple LATAs and made available to customers (another form of information service).

The Court noted in the gateway decision that BOC provision of an interLATA service by definition involved BOC provision of "telecommunications" between a point in one LATA and a point outside that LATA.[59] The same is true under the Act ("interLATA service" is defined as "telecommunications" between a point in one LATA and a point outside that LATA). As the Court of Appeals noted, the critical question in determining whether an interexchange service would be provided was whether "information services are...bundled with...interexchange lines...."[60]

In summary, the 1996 Act, the MFJ and the common sense meaning of the term "provide" all make it clear that for a BOC to "provide" an "interLATA [information] service," that BOC, and not some third party, must provide interLATA "telecommunications."[61]

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59 See United States v. Western Electric Co., 1989-1 Trade Cas. ¶ 68,400 at 60,203 (D.D.C. 1989), aff'd. 907 F.2d 160 (D.C. Cir. 1990).

60 See 907 F.2d at 163.

61 The Commission seeks comment (NPRM ¶¶ 46-47) on whether past BOC applications for interLATA MFJ waivers (or provision of a service pursuant to a CEI plan without an interLATA MFJ waiver) presumptively renders that service an "interLATA information service" (or an intraLATA information service). Although it is presumptively correct that BOC provision of a service without an interLATA waiver implies that the service is an intraLATA service, the converse is not necessarily true, since various BOCs (and the Department of Justice) occasionally found it expedient to apply for and obtain MFJ interLATA waivers where the interLATA (or not) status of the waivered activity was

D. The Meaning Of The Phrase "Electronic Publishing" Can Be Adequately Explored Only in A Separate Proceeding

The NPRM seeks comment on whether the Commission should classify services as "electronic publishing" services, as opposed to "information services", where the carrier controls, or has a financial interest in, the content of the information transmitted by the service (NPRM ¶ 53). Although that factor may be relevant, the definition of "electronic publishing" can only be adequately evaluated in the context of the numerous and complicated exceptions as identified in section 274(h)(2). NYNEX will provide more detailed comments in CC Docket 96-152.

E. The Implementation of The 1996 Act Will Make Certain Aspects Of The Commission's CI-II, CI-III And ONA Rules Unnecessary

The Commission concludes that because the 1996 Act did not establish regulatory requirements for BOC provision of intraLATA information services, the CI-II, CI-III and ONA requirements remain in place for those services to the extent those requirements are consistent with the Act (NPRM ¶48). In addition, the Commission concludes that it should continue to enforce those CI-II and ONA requirements that are consistent with the Act (NPRM ¶ 49). Therefore, the NPRM seeks comment on the extent to which existing CI-II, CI-III and ONA requirements are inconsistent with, or rendered unnecessary by, the Act (NPRM ¶¶ 49-50).

considered unclear by all parties. Thus, although the assumption may generally be correct, it should be rebuttable.

NYNEX respectfully urges that the Commission reconsider its conclusions. Congress specifically addressed the terms and conditions under which Bell operating companies should offer new or competitive services, and where appropriate provided for structural and non-structural safeguards. Another layer of safeguards or conditions would frustrate Congressional intent and would therefore be inappropriate.

1. When A BOC Meets The Checklist, Section 251 Interconnection and Unbundling Requirements Render CI-II, CI-III and ONA Rules Unnecessary

The Commission's CI-II, CI-III and ONA rules were originally established to protect the enhanced service industry and enhanced service providers from potential anticompetitive BOC conduct based on BOC control of underlying, local communications networks.[62] The 1996 Act requires BOCs to relinquish control of their local networks, and the new interconnection and unbundling requirements of Section 251 will result in a fundamental unbundling of a BOC's network into network elements, features, functions, and capabilities. A BOC's ability to use its control of the marketplace to discriminate against enhanced service providers will thus be eliminated, rendering the Commission's CI-II, CI-III and ONA rules unnecessary.[63] Specifically, once a BOC meets the checklist

[62] See, e.g., In the Matter of Filing and Review Of Open Network Architecture Plans, CC Docket No. 88-2, MO&O, released December 22, 1988, para 2.

[63] The enhanced services industry is a robust industry with a multitude of large, sophisticated players. Enhanced service providers will have the opportunity to utilize the services of a multitude of carriers to offer their services and to use their market leverage to negotiate the development of network capabilities or services. Carrier-based ESPs, such as AT&T and MCI, will have the opportunity to develop and integrate their own enhanced service and basic service offerings.

and is permitted to offer interLATA services, the Commission should consider that the BOC's network has been fundamentally unbundled and that the BOC should be relieved of its CI-II, CI-III and ONA obligations.

In addition, pending checklist compliance, the Commission should immediately complete its work on its Computer III Further Remand Proceeding and streamline its regulation consistent with today's regulatory environment and market realities. For example, the Commission should consider:

- Reinstating CI-III and removing the requirement for the filing of CEI Plans for "integrated" enhanced services.
- Eliminating the FCC's CI-III CPNI rules which go beyond section 222 of the Act.[64]

2. Section 272 Separate Affiliate Requirements Supersede The Commission's CI-II, CI-III And ONA Requirements

The Commission found that CI-II structural separation was one way to serve the goal of preventing BOC anticompetitive conduct relating to BOC provision of enhanced services. Although the interpretation of Section 272 separations requirements is a matter under review in this proceeding, it is clear that Section 272 affords protections that render the Commission's CI-II separate subsidiary safeguards redundant. As such, the Commission should find that BOC information services that are offered through a Section 272 affiliate (as required by statute for interLATA information services or by BOC choice for intraLATA information services) satisfy all relevant requirements. In such a case, CI-

[64] CPNI NPRM, NYNEX Comments, filed June 11, 1996 at pp. 18-21.

II, CI-III and ONA rules no longer have any independent relevance, although portions of the rules may be instructive. NYNEX will address the applicability of accounting safeguards in comments to be filed in CC Docket 96-150.

3. CI-II, CI-III, And ONA Requirements Are Rendered Unnecessary For BOC Section 272 Affiliates

As noted above, the Commission's CI-II, CI-III and ONA requirements were originally established to protect the enhanced service industry and enhanced service providers from potential anticompetitive BOC conduct based on BOC control of underlying, local communications networks. Because a BOC interLATA affiliate under Section 272 will operate independently from the BOC and thereby not have control of any underlying, local communications networks, the Commission's CI-II, CI-III and ONA requirements should not apply to a BOC affiliate which is compliant with Section 272 relative to its provision of basic and enhanced services.[65]

In addition, as discussed in Section VI following, the NYNEX interLATA affiliate will be a new entrant into the interLATA services business and will be clearly a non-dominant competitor. As such, it should be regulated in the same way as any other new entrant into the interLATA services business. The removal of CI-II, CI-III and ONA requirements for a BOC interLATA affiliate will place it on an equal

[65] For example, a BOC LD affiliate would not be required to offer comparably efficient interconnection (CEI) to its basic services and would be able to integrate enhanced operations and interLATA basic services.